



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

NOV 26 2013

Kermit D. Marsh, Esq.
Law Offices of Kermit D. Marsh
9550 Warner Ave., Suite 250
Fountain Valley, CA 92708

RE: MUR 6668

Dear Mr. Marsh:

On November 1, 2012, the Federal Election Commission ("Commission") notified your client, Mailing Pros, Inc., of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended (the "Act"). On November 19, 2013, the Commission found, on the basis of information provided in the complaint and by your client, that there is no reason to believe that your client violated the Act. Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003) and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66,132 (Dec. 14, 2009). The Factual and Legal Analysis, which more fully explains the Commission's findings, is enclosed.

If you have any questions, please contact Margaret Howell, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark Shonkwiler".

Mark Shonkwiler
Assistant General Counsel

Enclosure
Factual and Legal Analysis

13044350570

1 **FEDERAL ELECTION COMMISSION**

2
3 **FACTUAL AND LEGAL ANALYSIS**

4
5 **RESPONDENTS:** Jay Chen for Congress and MUR: 6668
6 Samuel Liu as treasurer
7 Jay Chen
8 America Shining and
9 Tara Geise as treasurer
10 Shaw Chen
11 Mailing Pros, Inc.
12

13 **I. GENERATION OF MATTER**

14 This matter was generated by a complaint filed by Bruce Buettell. *See*

15 2 U.S.C. § 437(g)(a)(1).

16 **II. FACTUAL AND LEGAL ANALYSIS**

17 **A. Factual Background**

18 Jay Chen was an unsuccessful candidate for the U.S. House of Representatives from
19 California's 39th Congressional District during the 2012 election cycle. His principal campaign
20 committee is Jay Chen for Congress and its treasurer is Samuel Liu (collectively, "Chen
21 Committee").

22 America Shining is an independent-expenditure-only political committee founded to
23 "support Asian American candidates for federal office." Ravi Krishnaney Decl. ¶ 1 (Dec. 18,
24 2012). As of its 2012 Year-End Report, Shaw Chen (Jay Chen's brother) had contributed
25 \$765,000 of the \$1,115,000 America Shining received in individual contributions since its
26 formation. Most, but not all, of America Shining's independent expenditures have been made in

13044350571

1 support of Jay Chen or against his opponent, Ed Royce.¹ *See* Independent Expenditure Reports
2 (Aug. 25, 2012 – Nov. 5, 2012).

3 Between early September and mid-October 2012, the Chen Committee distributed a
4 mailer advocating for Chen's election and bearing the postmark, "US POSTAGE PAID
5 MAILING PROS INC." Compl. at 3 (Oct. 24, 2012); *id.*, Ex. 3. The mailer features Chen's
6 image and states, "Jay Chen for Congress. New Leadership. New Ideas." *Id.*, Ex. 3.

7 During the same time period, America Shining distributed two mailers bearing the same
8 "MAILING PROS INC." postmark. Compl. at 3; *id.*, Exs. 1-2. The first discussed Royce's
9 votes on Medicare and included the statement, "Ed Royce. The Wrong Voice. The Wrong
10 Choice." *Id.*, Ex. 1. The second featured an image of Jay Chen and the statement, "Small
11 Businessman Jay Chen for Congress. A New Leader. A Brighter Future. Vote Jay Chen for
12 Congress on Tues., Nov. 6." *Id.*, Ex. 2.

13 Both committees' disclosure reports reveal several disbursements during this time period
14 for the purpose of direct mail, but do not disclose any disbursements to Mailing Pros, Inc.
15 ("Mailing Pros") or any other shared direct mail vendor. Based on the common postmark,
16 however, and noting that Jay and Shaw Chen are brothers, Complainant alleges that Respondents
17 violated the Act by coordinating the three mailers. Compl. at 2-5. Respondents all deny that any
18 coordination occurred.

19 Jay Chen and the Chen Committee argue that Mailing Pros does not qualify as a common
20 vendor for the purpose of the Commission's coordination regulation.² The Chen Committee

¹ America Shining disclosed a total of \$1,055,660 in independent expenditures for the 2012 election cycle, of which \$1,049,518 were made in support of Chen or in opposition to Royce.

² Jay Chen and the Chen Committee filed separate Responses. *See* Jay Chen Resp. (Dec. 18, 2012); Chen Comm. Resp. (Jan. 8, 2013). The Chen Committee Response incorporates Jay Chen's Response by reference. Chen Comm. Resp. at 1.

1 asserts that Mailing Pros was merely a sub-vendor hired by one of its mail consultants, and thus
2 the Chen Committee has had no communication with Mailing Pros.³ Chen Comm. Resp. at 1
3 (Jan. 8, 2013); Jay Chen Resp. at 1 (Dec. 18, 2012). The Responses claim that Mailing Pros does
4 not provide any of the services that would subject it to common vendor status since it does not
5 participate in any "strategy or design work." Jay Chen Resp. at 1. Instead, Mailing Pros is
6 allegedly responsible only for "(1) printing mail pieces produced by Baughman⁴ in Washington
7 D.C.; (2) printing on mailing addresses from a list provided by Baughman; [and] (3) delivering
8 the completed mailers to the nearest post office." *Id.* at 3. Further, the Responses assert that
9 Mailing Pros's entire process is completed within a few days, meaning that Mailing Pros is only
10 aware of the mail campaign for a short time before it becomes public, thereby "limiting any
11 strategic value [Mailing Pros] possesses." *Id.* at 2. Finally, the Responses contend that there is
12 no evidence that Mailing Pros conveyed any of the Chen Committee's plans to America Shining,
13 noting that the mail pieces at issue do not share any common language or content. *Id.*

14 America Shining and Shaw Chen submitted a joint Response ("America Shining
15 Response"), including sworn declarations from Shaw Chen and Ravi Krishnaney, the president
16 and founder of America Shining. The America Shining Response echoes the Chen Committee
17 Response: It states that Mailing Pros did not participate in the creative process or participate in
18 any decisions relating to the funding or targeting of the mailings, and therefore was not in a
19 position to convey any information between the Chen Committee and America Shining.
20 America Shining Resp. at 2-3 (Dec. 21, 2012). Krishnaney specifically attests that: (1) Mailing

³ Jay Chen asserts that he was unaware that Mailing Pros was a sub-vendor of the Chen Committee until he learned of the Complaint in this matter. Jay Chen Resp. at 1.

⁴ Baughman is a political advertising firm. The Chen Committee's 2012 October Quarterly and Pre-General Reports disclose a total of seven disbursements to "The Baughman Co." for the purposes of "mailers and postage," "mail production and postage," and "design/copy production/postage of mail piece."

13044350573

1 Pros did not provide any strategic services to America Shining, but rather was used solely as a
2 printer; (2) Mailing Pros did not convey any information regarding the Chen Committee to
3 America Shining; (3) before receiving the Complaint, Krishnaney was unaware that Mailing Pros
4 was also a vendor of the Chen Committee; and (4) no non-public information regarding the
5 plans, projects, or needs of the Chen Committee were communicated to himself or any other
6 agent of America Shining. Krishnaney Decl. ¶¶ 4-6.

7 The America Shining Response also specifically addresses the familial relationship
8 between its primary donor, Shaw Chen, and the candidate it supported, Jay Chen. The Response
9 claims that no coordination took place between Shaw and Jay Chen, and argues that “the mere
10 fact that Shaw Chen is Jay Chen’s brother, does not implicate any portion of the Commission’s
11 coordination regulations.” America Shining Resp. at 2-3. Krishnaney attests that America
12 Shining approached Shaw Chen for funding, and did not discuss this approach with Jay Chen or
13 any other agent of the Chen Committee. Krishnaney Decl. ¶ 2. Furthermore, Shaw Chen attests
14 that:

- 15 • He did not discuss his intent to contribute to America Shining with his brother or any
16 employee or agent of the Chen Committee. Shaw Chen Decl. ¶ 3 (Dec. 15, 2012).
- 17
- 18 • Although Shaw Chen was occasionally shown America Shining’s draft materials, he “did
19 not provide any significant substantive feedback,” did not participate in creation or
20 substance of the advertisements, and did not participate in the management of the
21 committee. *Id.* ¶ 4.
- 22
- 23 • Shaw Chen did not learn of any non-public information regarding the Chen Committee’s
24 projects, needs, or plans through discussions with his brother or any agent or employee of
25 the Chen Committee. *Id.* ¶ 6.

26 Mailing Pros disputes that it is a company “running mail campaigns,” as the Complaint
27 claims. Mailing Pros Resp. at 4 (Nov. 16, 2012). Rather, Mailing Pros explains, it focuses on
28 mail addressing and processing as well as postage and postal service requirements, but does not

13044350574

1 engage in printing or list acquisition. *Id.* at 2. It performs services such as inserting addresses
2 (provided by the customer) onto pre-printed mail pieces and attaching its bulk mail postal permit
3 marker (*e.g.*, "US Postage Paid, Mailing Pros, Inc."), but "does not determine what to say, how
4 to convey it, or to whom to say it." *Id.* at 2-4.

5 **B. Legal Analysis**

6 Expenditures made by any person in cooperation, consultation, or concert with, or at the
7 request or suggestion of a candidate, the candidate's authorized political committees, or agents,
8 are considered contributions to such candidate. 2 U.S.C. § 441a(a)(7)(B). When a person pays
9 for a communication that is coordinated with a candidate or his or her authorized committee, the
10 communication is considered an in-kind contribution from the person to that candidate and is
11 subject to the limits, prohibitions, and reporting requirements of the Federal Election Campaign
12 Act of 1971, as amended (the "Act"). 11 C.F.R. § 109.21(b); *see also* 2 U.S.C. § 441a(a).

13 A communication is coordinated with a candidate, authorized committee, or agent thereof
14 if it meets a three-prong test set forth in the Commission regulations: (1) it is paid for, in whole
15 or in part, by a person other than the candidate or authorized committee; (2) it satisfies one of
16 five content standards in 11 C.F.R. § 109.21(c);⁵ and (3) it satisfies one of six conduct standards
17 in 11 C.F.R. § 109.21(d).⁶ 11 C.F.R. § 109.21(a).

18 In this matter, the mailer sent by the Chen Committee does not satisfy the first prong of
19 the coordination test. *See* 11 C.F.R. § 109.21(a)(1). The Complaint does not allege that the

⁵ The following types of content satisfy the content prong: (1) electioneering communications; (2) public communications that disseminate, distribute, or republish campaign materials; (3) public communications containing express advocacy; (4) public communications that refer to a clearly identified federal candidate or political party within the relevant jurisdiction during a specified time period preceding the election; and (5) public communications that are the functional equivalent of express advocacy. 11 C.F.R. § 109.21(c).

⁶ The following types of conduct satisfy the conduct prong: (1) request or suggestion; (2) material involvement; (3) substantial discussion; (4) common vendor; (5) former employee or independent contractor; and (6) dissemination, distribution, or republication of campaign material. 11 C.F.R. § 109.21(d).

1 Chen Committee's mailer was paid for to any extent by America Shining or any other person;
2 indeed, as the Complaint acknowledges, the mailer clearly states that it was paid for by the Chen
3 Committee. Compl. at 4, Ex. 3.

4 The two mailers sent by America Shining satisfy the payment and content prongs of the
5 coordination test, but fail the conduct prong. America Shining does not deny that it paid for its
6 mailers. *See generally* America Shining Resp.; *see* 11 C.F.R. § 109.21(a)(1). And the content
7 prong is satisfied because both mailers clearly identify a House candidate and were publicly
8 distributed in the relevant jurisdiction within 90 days of the 2012 general election. *See* 11 C.F.R.
9 § 109.21(c)(4).

10 But despite Complainant's allegations, there is no information suggesting that either
11 America Shining mailer satisfies any of the six conduct standards of 11 C.F.R. § 109.21(d). And
12 the Complaint specifically highlights that Jay and Shaw Chen are brothers, implying that this
13 familial relationship aided the coordination alleged. Compl. at 2. But neither of these
14 allegations satisfies the conduct prong.

15 1. Common Vendor

16 The conduct prong is satisfied under section 109.21(d)(4) where: (1) the person paying
17 for the communication, or his agent, contracts with or employs a commercial vendor⁷ to create,
18 produce, or distribute a communication; (2) that commercial vendor has provided any of several

⁷ "Commercial vendor" is defined as "any persons providing goods or services to a candidate or political committee whose usual and normal business involves the sale, rental, lease, or provision of those goods or services." 11 C.F.R. § 116.1(c).

13044350576

1 enumerated services⁸ to the candidate who is clearly identified in the communication, or the
2 candidate's opponent, during the past 120 days; and (3) that commercial vendor uses or conveys
3 to the person paying for the communication information about the campaign plans, projects,
4 activities, or needs of the clearly identified candidate (or his opponent, as the case may be), and
5 that information is material to the creation, production, or distribution of the communication.

6 11 C.F.R. § 109.21(d)(4).

7 Here, the facts here fail to establish that the second or third requirements are satisfied. As
8 to the second requirement, there is no information that Mailing Pros provided any of the services
9 specifically enumerated in the Commission's regulation.⁹ Mailing Pros did not participate in
10 media strategy, develop mailing lists, or consult on the content of the mailers; it merely affixed
11 the provided addresses and its bulk-mailing postmark to the pre-printed mailers,¹⁰ and delivered
12 the mailers to the post office. Jay Chen Resp. at 1-3; Mailing Pros Resp. at 2-4. Under these
13 circumstances, Mailing Pros cannot be said to have participated in the "production" of the
14 mailer. See Factual & Legal Analysis, MUR 6050 (Boswell for Congress) at 8 ("The mere fact
15 that [Respondents] used two common vendors . . . is noteworthy and accounts for the fact that
16 the mailers contain the same postage permit number and indicia; but it is not sufficient to
17 establish coordination by itself.").

⁸ The following activities comprise the enumerated services: development of media strategy, including the selection or purchasing of advertising slots; selection of audiences; polling; fundraising; developing the content of a public communication; producing a public communication; identifying votes or developing voter lists, mailing lists, or donor lists; selecting personnel, contractors, or subcontractors; and consulting or otherwise providing political or media advice. 11 C.F.R. § 109.21(d)(4)(ii)(A)-(I).

⁹ The second requirement is dependent not on whether America Shining directly employed Mailing Pros, but rather the specific services that Mailing Pros provided to the Chen Committee. See 11 C.F.R. § 109.21(d)(4)(ii).

¹⁰ Although the Chen Committee states that Mailing Pros was used as a printer, *see supra* p.3, this statement appears to reflect a misunderstanding on the part of the Chen Committee as to whether its direct mail consultant or Mailing Pros actually performed the printing services. Mailing Pros's detailed explanation of its services explicitly states that it does not perform printing services. Mailing Pros Resp. at 2. This inference is also supported by the fact that the Chen Committee does not contract directly with Mailing Pros. Jay Chen Resp. at 2-3.

13044350577

1 Furthermore, the Complaint fails to present any information indicating that Mailing Pros
2 used or conveyed to America Shining any information regarding Jay Chen or the Chen
3 Committee, much less information material to the creation, production, or distribution of the
4 mailers. On the contrary, Krishnaney specifically attests that no such conveyance occurred.
5 Krishnaney Decl. ¶ 5. In sum, the common vendor standard is not satisfied.

6 2. Family Relationship

7 The Complaint points out that Jay and Shaw Chen are siblings. Compl. at 2. But the
8 Commission has never determined that a familial relationship — standing alone — is sufficient
9 to find reason to believe that coordination took place. In the present matter, the Complaint does
10 not allege, and there is no information evidencing, any discussion, participation, or other activity
11 between the Chen brothers that might satisfy the conduct prong. Furthermore, Shaw Chen
12 specifically attests otherwise — his declaration states that he did not learn any non-public
13 information regarding the Chen Committee's projects, needs, or plans through discussions with
14 his brother or any other agent of his campaign committee, and that he did not discuss his intent to
15 contribute to America Shining with his brother or anyone else from the Chen Committee. Shaw
16 Chen Decl. ¶¶ 3-6. Accordingly, there is no information suggesting that Jay and Shaw Chen
17 engaged in any activity that would satisfy the conduct prong of the Commission's coordination
18 regulation.

19 C. Conclusion

20 The available information does not indicate that America Shining coordinated its
21 communications with, and thereby made an in-kind contribution to, the Chen Committee. Thus,
22 there is no basis for the Complaint's contention that America Shining has violated the Act by
23 raising funds in unlimited amounts for independent expenditures.

13044350578

1 The Commission therefore found no reason to believe that America Shining and Shaw
2 Chen violated 2 U.S.C. § 441a(a) by making excessive contributions; found no reason to believe
3 that the Chen Committee and Jay Chen violated 2 U.S.C. § 441a(f) by accepting excessive or
4 prohibited contributions; found no reason to believe that America Shining violated 2 U.S.C.
5 § 441a(f) by accepting excessive contributions; and found no reason to believe that Mailing Pros
6 violated the Act.

13044350579